IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 13, 2009

STATE OF TENNESSEE v. TONEY DEANDRE CRUTCHER

Direct Appeal from the Circuit Court for Marshall County
No. 2008-CR-37 Robert Crigler, Judge

No. M2008-02053-CCA-R3-CD - Filed September 4, 2009

The Defendant, Toney Deandre Crutcher, pled guilty to possession of more than .5 ounces of marijuana with the intent to sell and possession of more than .5 ounces of marijuana with the intent to deliver. The Defendant agreed to an eighteen-month sentence, with the trial court to determine the manner of service of his sentence. After a sentencing hearing, the trial court merged the intent to deliver conviction with the intent to sell conviction and ordered the Defendant, a Range I offender, to serve ninety days of his sentence in jail with the balance of the sentence to be served on probation. On appeal, the Defendant contends the trial court erred when it ordered him to serve part of his sentence in confinement. After a thorough review of the evidence and the applicable authorities, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and ALAN E. GLENN, JJ., joined.

Randall E. Self, Fayetteville, Tennessee, for the Appellant, Toney Deandre Crutcher.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Benjamin A. Ball, Assistant Attorney General; Chuck Crawford, District Attorney General; Weakley E. Barnard, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts

On February 20, 2008, the Marshall County grand jury indicted the Defendant for possession of more than .5 ounces of marijuana with the intent to sell and for possession of more

than .5 ounces of marijuana with the intent to deliver. During the sentencing hearing, the State requested that the facts that were read into the record at the time of the plea be incorporated, and the trial court so ordered. We, however, can find no recitation of those facts in the record.

James Grimes, the Defendant's probation officer, testified that he prepared the Defendant's presentence report. For the report, Grimes interviewed the Defendant, who was twenty-two at the time of sentencing. Grimes noted that this case involved marijuana that was located in a residence and found after police executed a search warrant. During the interview, the Defendant told Grimes that the marijuana seized belonged to him and that he intended to sell it. The Defendant said he had sold marijuana numerous times and estimated that he had conducted over 600 sales during a two and a half year period. The Defendant told Grimes he made approximately $60,000 per year selling marijuana, for a total of $150,000 in two and a half years. The Defendant said that he obtained his marijuana from a Mexican in Shelbyville but volunteered no further description. The Defendant told Grimes that he purchased five to ten pounds of marijuana at a time and sold it in quarter-pound increments to thirty or so customers.

Grimes testified that police seized items worth thousands of dollars during the search. These items included: large screen televisions; a set of digital scales; a pistol; a shotgun; DVD players; a surveillance system; and stereo equipment. Police also seized over 900[1] grams of marijuana.

[1]There is some discrepancy in the record about whether the amount seized was 695 grams or 900 grams. This variance is not relevant to our inquiry herein.

Grimes recounted the Defendant's educational and work history, noting that the Defendant said he graduated from high school and completed two years of college. About his work history, the Defendant told Grimes he had worked for a construction company from May 1, 2007, until April 1, 2008, and then at a company known as "CKNA" from May 1, 2008, to the time of the interview. Grimes said he verified that the Defendant had a bank stub showing his employment with CKNA at the time of the interview.

Grimes testified the Defendant had previously been charged with possession of drug paraphernalia in 2006, and the charge was still pending.

On cross-examination, Grimes described the Defendant as "incredibly honest and upfront." He agreed that the Defendant was estimating when the Defendant said he made approximately $60,000 per year selling marijuana. The Defendant told Grimes that he helped to financially support his girlfriend. Grimes agreed that there was no specific victim in this case and that the Defendant had no prior criminal history.

Based upon this evidence and the arguments of counsel the trial court sentenced the Defendant to ninety days in jail, with the balance of his sentence to be served on probation. It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends the trial court erred when it ordered him to serve part of his sentence in confinement. In support of his contention, he asserts the trial court erred when it: (1) considered mitigating and enhancement factors after finding the sentencing considerations factors enumerated in Tennessee Code Annotated section 40-35-103(1)(A)-(C) favored giving the Defendant a probationary sentence; (2) failed to properly consider the Defendant's candor as evidence of his potential for rehabilitation or treatment; and (3) failed to articulate how the mitigating factor it applied was evaluated and failed to adequately weigh that mitigating factor.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the mitigating and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and -114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and (7) any statement the defendant made in the defendant's own behalf about sentencing. *See* T.C.A. § 40-35-210 (2009); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). We must also consider the potential or lack of potential for rehabilitation or treatment of the defendant in determining the sentence alternative or length of a term to be imposed. T.C.A. § 40-35-103 (2009).

Pursuant to Tennessee Code Annotated section 40-35-303(a), a defendant is eligible for probation if the sentence actually imposed is ten years or less. The Defendant in the case under submission was convicted of two Class E felonies, and Tennessee Code Annotated section 40-35-102(6) states that those convicted of Class C, D, or E felonies "should be considered as a favorable candidate for alternative sentencing . . . ." Although alternative sentencing must be considered by the trial court a defendant is not automatically entitled to an alternative sentence. Tenn. Code Ann. § 40-35-303(b); *State v. Fletcher*, 805 S.W.2d 785, 787 (Tenn. Crim. App. 1991). The burden of proving suitability for probation at the trial court level rests with the defendant. T.C.A. § 40-35-303(b); *State v. Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). In the case under submission, the trial court granted the Defendant an "alternative sentence" in that it ordered split confinement. *See State v. Christina B. Jones*, No. M2002-

02428-CCA-R3-CD, 2003 WL 21436350, at *3 (Tenn. Crim. App., at Nashville, June 23, 2003) (Tipton, J. dissenting), *Tenn. R. App. P. 11 application denied* (Tenn. Oct. 27, 2003). The issue in this appeal, therefore, is whether the trial court erred when it denied the Defendant full probation.

"A criminal defendant seeking full probation bears the burden on appeal of showing the sentence actually imposed is improper, and that full probation will be in both the best interest of the defendant and the public." *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997) (citing *State v. Bingham*, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995)). "[A] defendant is required to establish his suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999). "Among the factors applicable to probation consideration are the circumstances of the offense; the defendant's criminal record, social history and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public." *State v. Kendrick*, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999) (citing *State v. Grear*, 568 S.W.2d 285 (Tenn. 1978)).

When considering incarceration, a trial court must consider the following principles:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103(1)(A)-(C). Additionally, the sentence must be no greater than that which is deserved, and it should be the least restrictive measure to achieve the desired goals. T.C.A. § 40-35-103(2), (4). Finally, the trial court is to also consider the potential for rehabilitation. T.C.A. § 40-35-103(5).

The Defendant first contends that the trial court erred when it considered mitigating and enhancement factors after it had found that all of the primary considerations in Tennessee Code Annotated section 40-35-103(1)(A)-(C) favored probation for the Defendant. The Defendant asserts that mitigating factors and enhancement factors are relevant to the length of sentence, which was not at issue in this case and should not have been considered by the trial court.

Indeed the record indicates that the trial court considered the 40-35-103 factors, stating that the Defendant was a first time offender, that there had been no proof of deterrence, and that the Defendant had never before had a probationary sentence. Accordingly, the trial court stated, "[T]he basic three factors in 40-35-103 (A) through (C) are all in the Defendant's favor, and I so find for the record." The trial court went on to consider mitigating and enhancement factors, finding one mitigating factor applicable, that the Defendant's conduct neither caused nor threatened serious bodily injury; and finding one enhancement factor applicable: that the Defendant had a previous history of criminal behavior in addition to those necessary to establish the appropriate range. The trial court based its imposition of confinement on the Defendant's admitted "huge amount of criminal conduct." The trial court specifically noted that it placed "Great emphasis on the fact that when a question was asked, how much did you sell at a time,

the answer was a quarter pound. . . . I take it that those were not casual exchanges . . . . [T]hat is not an insignificant amount in the Court's opinion."

We conclude that the trial court properly considered enhancement and mitigating factors when determining the Defendant's sentence. Further, we conclude that it denied the Defendant full probation based upon appropriate considerations, one of those being the circumstances of the offense. Specifically, the trial court considered that the Defendant had sold drugs frequently, more than 600 times, in quarter-pound increments and profited an estimated $150,000 by so doing. These are appropriate and adequate considerations upon which to deny the Defendant a full probationary sentence.

The Defendant next contends that the trial court erred when it failed to consider his candor as potential for rehabilitation or treatment. The trial court stated that this case was one in which "everything [wa]s in the Defendant's favor for alternative sentencing except [the Defendant's repeated criminal conduct]." This presumably included his potential for rehabilitation and treatment. Further, as to the Defendant's candor, the trial court said quite clearly that if the information provided by the Defendant had "come from some source other than the Defendant, I would deny alternative sentencing in its entirety. Since this information came from the Defendant and he has in essence told on himself, I am going to order the Defendant to serve 90 days and the balance on probation." The trial court appropriately considered the Defendant's candor and his potential for rehabilitation or treatment.

Finally, the Defendant contends that the trial court erred when it failed to articulate how the mitigating factor it applied, that the offense neither caused nor threatened seriously bodily injury, was evaluated and when it found that this mitigating factor had already been taken into account by the Legislature when it set the range of punishment. We have thoroughly reviewed the trial court's consideration of the mitigating factors and find that it adequately articulated its reasoning in the record. The trial court stated, "It appears there is one mitigating, neither caused nor threatened serious bodily injury. I do think the legislature probably took that into account to some extent when they set the punishment for that particular offense." The trial court went on to discuss the circumstances of the offense, upon which it relied when denying the Defendant full probation. We conclude that the trial court committed no error, and the Defendant is not entitled to the relief he seeks.

III. Conclusion

After a thorough review of the record and applicable authorities, we affirm the trial court's judgment.

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ROBERT W. WEDEMEYER, JUDGE